Hue Ah Kow v Wai Ah Wah

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUIT NO S2–24–1204 OF 1998
KAMALANATHAN RATNAM J
24 AUGUST 2000

Land Law *— Restraints on dealings — Caveats — Caveatable interest — Sale and purchase agreement terminated — Attempt to enter fresh negotiation — Whether purchaser has caveatable interest — while entering fresh negotiation*

On 29 November 1996, the plaintiff (vendor) and the defendant (purchaser) entered into a sale and purchase agreement in respect of a property known as Lot No C47, Bukit Jalil Golf and Country Resort, Kuala Lumpur ('the property'). On 2 May 1998, the defendant's solicitors wrote to the plaintiff's solicitors ('exh HAK-4') informing that the defendant was not able to purchase the land at the original price of RM55 per sq ft but was prepared to purchase the same at RM45 per sq ft. The plaintiff's solicitors agreed to the defendant's proposal except that the plaintiff stipulated that the balance purchase price ought to be paid on or before 30 June 1998. Since the balance payment was not received by 30 June 1998, the plaintiff's solicitors wrote to the defendant's solicitors terminating the sale transaction and the plaintiff applied to remove the caveat entered by the defendant.

Held, allowing the application:
The plaintiff's solicitor had by their letter dated 1 May 1998 made it clear that the agreement had been terminated and negotiations had commenced towards a fresh agreement. The plaintiff had stated that he intended to forfeit the deposit. By making a fresh offer at RM45, the defendant had accepted the termination and had proposed to enter into negotiations for a fresh contract. There was no variation of the contract. It was a simple case of termination of the existing contract and an attempt to enter into a fresh one. Since the contract had been terminated and parties were negotiating towards a new contract, the defendant had no interest in the property to give him a right to caveat (see pp 75I–76A).

[Bahasa Malaysia summary

Pada 29 November 1996, plaintif (penjual) dan defendan (pembeli) menandatangani perjanjian jualbeli berkenaan hartanah yang dikenali sebagai Lot No C47, Bukit Jalil Golf and Country Resort, Kuala Lumpur ('hartanah tersebut'). Pada 2 Mei 1998, peguamcara-peguamcara defendan berutus kepada peguamcara-peguamcara plaintif memberitahu mereka bahawa defendan tidak mampu membeli hartanah tersebut pada harga asal RM55 per kaki persegi tetapi sudi membeli hartanah tersebut pada RM45 per kaki persegi. Peguamcara-peguamcara plaintif bersetuju dengan cadangan

defendan, kecuali plaintif telah menetapkan bahawa baki harga belian harus dibayar pada atau sebelum 30 Jun 1998. Oleh kerana baki bayaran itu tidak diterima sebelum 30 Jun 1998, peguamcara-peguamcara plaintif berutus kepada peguamcara-peguamcara defendan untuk menamatkan urusan jualan tersebut dan plaintif memohon untuk membatalkan kaveat yang dimasukkan oleh defendan.

Diputuskan, membenarkan permohonan tersebut:
Peguamcara-peguamcara plaintif, melalui surat mereka yang bertarikh 1 Mei 1998, telah menegaskan bahawa perjanjian tersebut telah ditamatkan dan perundingan telah dimulakan bagi perjanjian baru. Plaintif telah menyatakan bahawa beliau berniat merampas deposit. Dengan membuat tawaran baru pada RM45, defendan telah menerima penamatan tersebut dan telah mencadangkan perundingan bagi kontrak baru. Tidak terdapat apa-apa pengubahan (variation) dalam kontrak tersebut. Ini merupakan kes ringkas penamatan kontrak yang wujud dan percubaan memulakan kontrak baru. Oleh kerana kontrak tersebut telahpun ditamatkan dan pihak-pihak sedang berunding memulakan kontrak baru, defendan tidak mempunyai apa-apa kepentingan dalam harta tersebut untuk memberikannya hak kaveat (lihat ms 75I–76A).]

Notes

For cases on caveatable interest generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2685–2751.

Francis Goh (*Francis Goh Alvin John & Co*) for the plaintiff.
KF Low (*Mak & Co*) for the defendant.

Kamalanathan Ratnam J:

Facts

On 29 November 1996, the plaintiff ('the vendor') and the defendant ('the purchaser') entered into a sale and purchase agreement in respect of property known as Lot No C47, Bukit Jalil Golf and Country Resort, Kuala Lumpur, held under HS(D) 81793, PT No 5154, Mukim Petaling, Daerah dan Negeri Wilayah Persekutuan ('the said property') for a purchase price of RM354,648. The defendant had paid the usual 10% deposit upon signing the agreement. It was a term of the agreement that the balance was to be paid within three months from the date the vendor received the consent to transfer the said property to the purchaser from the Jabatan Tanah dan Galian Wilayah Persekutuan ('the authority'). The purchaser was also provided with a grace period of one month after the expiry of the three months. It was also an express term of the agreement that if the purchaser failed to make the payment within the period provided, the agreement was deemed to be terminated and the plaintiff vendor was

entitled to forfeit the 10% deposit paid with the agreement becoming null and void and the parties having no claim whatsoever against each other except for antecedent breaches. Upon the plaintiff's solicitors' writing to the authority for the consent on 18 November 1997, the relevant authority, by its letter dated 26 January 1998 gave its consent and the plaintiff's solicitors by their letter dated 3 February 1998, forwarded to the defendant's solicitors a copy of the said letter of consent.

On 2 May 1998, the defendant's solicitors wrote to the plaintiff's solicitors ('exh HAK-4') informing the latter that due to certain circumstances the defendant 'is not able to afford to purchase' the said land at the original price of RM55 per sq ft but was prepared to purchase the same at RM45 per sq ft. The plaintiff counter-offered at RM50 per sq ft by its letter dated 6 May 1998 ('exh HAK-5'). The defendant replied insisting on RM45 per sq ft and also agreed to settle in full the balance. The plaintiff's solicitors agreed to the defendant's proposal by their letter dated 2 June 1998 except that the plaintiff stipulated that the balance purchase price ought to be paid on or before 30 June 1998. Since no further reply was forthcoming, the plaintiff's solicitors sent a reminder letter dated 11 June 1998 to the defendant's solicitors. The defendant's solicitors' letter, which was dated 30 June 1998, enclosing the draft supplementary agreement was only faxed to the plaintiff's solicitors on 1 July 1998. Since the balance payment was not received by 30 June 1998 the plaintiff's solicitors wrote a letter dated 1 July 1998 to the defendant's solicitors terminating the agreement.

This is the plaintiff's application to remove the caveat entered by the defendant.

Findings of the court

Upon receipt of the defendant's letter dated 30 June 1998 on 1 July 1998 the plaintiff faxed his reply dated 1 July 1998. It is necessary to reproduce the full text of the said letter which reads as follows:

> 1 July 1998
>
> By Fax: 7807884/Registered Post
>
> Messrs Mak & Company
> Advocates and Solicitors
> 31, 2nd Floor, Jalan 3/108C
> Taman Sungai Besi
> 57100 KUALA LUMPUR
> Attn: Mr Mak Foo Wei
>
> Dear Sirs
>
> Re: Sale and Purchase of Property known as
> HS(D) 81793 No PT 5154, Mukim Petaling
> Vendor: Hue Ah Kow
> Purchaser: Wai Ah Wah
> We refer to your letters dated 30 June 1998 and 1 July 1998 which were received by us via fax today with regards to the above matter.
>
> We also refer to our letters to you dated 2 June 1998 and 11 June 1998 with regards to the same.

> We regret that your client has failed to pay to us as stakeholder the balance purchase price on or before 30 June 1998 as stated in our aforesaid letters.
>
> In the circumstances, our client instructed us that the sale and purchase agreement dated 29 November 1996 is hereby terminated and the deposit of RM35,464.80 paid by your client pursuant to the aforesaid sale and purchase agreement is therefore forfeited pursuant to cl 8.1 found therein. Also pursuant to the same clause, kindly return to us the transfer documents and also the duly executed notice of withdrawal of caveat together with the requisite fees forthwith.
>
> In the circumstances the aforesaid sale and purchase agreement is null and void and our client has a right to re-sell the aforesaid property to a third party.
>
> Yours faithfully,
>
> Sgd
>
> cc: client

I cannot accept the defendant's submission that exh HAK-4 does not show an intention not to proceed with the purchase. The defendant's solicitors' letter is expressly clear. The defendant said in no uncertain terms that he was not able to purchase the said land at the existing price and made a fresh offer with a lower price per square foot. It is my judgment that with this, the agreement had been terminated and subsequent negotiations had begun with the plaintiff counter-offering to sell at RM50 per sq ft. I reject the defendant's argument that his fresh offer as contained in exh HAK-4 was a variation of the sale and purchase agreement.

Notwithstanding the fact that in his letter dated 1 July 1998 the plaintiff had stated that he was terminating the sale and purchase agreement dated 29 November 1996, I hold that the agreement was already legally terminated when the defendant was unable to pay the balance of the purchase price by the time earlier stipulated. Mistake by the solicitors in stating that the agreement was terminated by the letter dated 1 July 1998 does not detract from the fact that the law had provided for the termination of the agreement as and when the defendant said he was unable to settle the balance. In fact, as contained in his solicitors' letter dated 1 May 1998 ('exh HAK-5') the plaintiff said as follows:

> Our client instructed us to inform you that since your client is not able to purchase the abovesaid property, the deposit paid by your client pursuant to the sale and purchase agreement dated 29 November 1996 is to be forfeited by our client. Our client further instructs us to inform you that he is agreeable to sell the aforesaid property to your client at the price of RM50 per sq ft and that a new sale and purchase agreement to be drawn up for the abovesaid price.

This letter is explicit. The agreement has been terminated and negotiations had commenced towards a fresh agreement. The plaintiff had stated that he intended to forfeit the deposit and this is to my mind expresses a clear

intention to invoke the specific clause in the agreement relating to forfeiture. By making a fresh offer at RM45 by his letter dated 13 May 1998, the defendant had accepted the termination and had proposed to enter into negotiations for a fresh contract. There is no place here for any variation of the contract. It is a simple case of termination of the existing contract and an attempt to enter into a fresh one. Since the contract had been terminated and parties were negotiating towards a new contract the defendant had no interest in the said property to give him a right to caveat. In other words he had no caveatable interest.

On 4 July 2000 when I heard the arguments, instead of allowing the application with costs I had inadvertently recorded that the said application be dismissed with costs. Since the order has not as yet been drafted nor perfected, I am rectifying the error. I therefore vacate my earlier order dismissing the application with costs and allow the application in that:

(1) the caveat entered against the said property is to be cancelled;

(2) the Registrar of Titles Wilayah Persekutuan Kuala Lumpur is to cancel the said caveat upon being served with a copy of this order;

(3) the learned SAR is to fix a date to assess damages; and

(4) costs to the plaintiff.

Application allowed.

Reported by Benjamin Yong